UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

WILKES-BARRE BEHAVIORAL HOSPITAL CO., LLC d/b/a FIRST HOSPITAL WYOMING VALLEY	:	Case No. 04-CA-215690
and	:	
SERVICE EMPLOYEES INTERNATIONAL UNION HEALTHCARE PENNSYLVANIA	:	

RESPONDENT'S ANSWERING BRIEF TO COUNSEL FOR THE GENERAL COUNSEL'S CROSS-EXCEPTIONS

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April 2, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

For all of the following reasons, the National Labor Relations Board (hereafter, the "Board") should reject the arguments set forth by the Cross-Exceptions and Brief in Support of Cross-Exceptions (hereafter, the "Cross-Exceptions") filed by Counsel for the General Counsel of the Board (hereafter, the "General Counsel") in response to the November 5, 2019 Decision of Administrative Law Judge Geoffrey Carter (hereafter, the "Decision").

PROCEDURAL HISTORY

Charging Party SEIU Healthcare Pennsylvania (hereafter, the "Union") was certified as the collective bargaining representative of certain employees at the Hospital, a mental health facility located in Kingston, Pennsylvania, in approximately in 2014. (Tr. 28.) [1] On March 1, 2018, the Union filed with Region Four of the National Labor Relations Board (hereafter, the "Region" or "Region Four" and the "Board", respectively) an Unfair Labor Practice Charge in Case No. 04-CA-215690 (hereafter, the "Charge"), alleging that the Hospital had violated the National Labor Relations Act (hereafter, the "Act") by, in relevant part, failing and refusing to bargain in good faith with the Union by unilaterally declaring impasse and implementing its final offer. G.C. Ex. 1(d). On May 18, 2018, the Union amended its Unfair Labor Practice Charge in Case No. 04-CA-215690 to remove

[1] General Counsel Exhibits will be notated "G.C. Ex. __". Respondent Exhibits will be notated "R. Ex. __". Charging Party Exhibits will be notated "C.P. Ex. __". References to the transcript of the hearing will be notated "(Tr. __)".

certain allegations, but the allegation that the Hospital had violated the Act by failing and refusing to bargain in good faith with the Union by unilaterally declaring impasse and implementing its final offer remained. G.C. Ex. 1(f).

On December 28, 2018, the Regional Director of Region Four issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, whereby the instant case was consolidated with two other pending cases, 04-CA-143930 and 04-UD-161302. G.C. Ex. 1(h). The Hospital filed a timely Answer to the Consolidated Complaint, which denied the material allegations of the Consolidated Complaint, on January 10, 2019. G.C. Ex. 1(j). Case No. 04-UD161302 was severed from the instant case on May 6, 2019, and the parties reached a settlement of Case No. 04-CA-143930 on July 22, 2019, and as a result, the Region subsequently issued two Orders Severing and Withdrawing Portions of the Consolidated Complaint on May 6, 2019 and July 22, 2019, which set the hearing for August 5, 2019 and subsequent days as necessary. (Tr. 31); G.C. Exs. 1(n), 1(p). On August 3, 2019, the Hospital timely filed an Amended Answer to the Amended Complaint, which denied the material allegations of the Complaint and set forth an Affirmative Defense to the Complaint, which averred that throughout the course of negotiations, the Union had bargained in bad faith in violation of the Act.

Thereafter, the record was opened before the Judge on August 5, 2019, and closed on August 6, 2019. [2] (Tr. 1, 450) The Judge issued his Decision on November 5, 2019, finding that the Hospital had violated Sections 8(a)(1) and (5) of the Act by implementing its final offer when the parties had not reached a good faith impasse. The Hospital filed Exceptions to the Decision on December 10, 2019. Thereafter, on March 5, 2019, the General Counsel filed Cross-Exceptions to the Decision and a Brief in Support of its Cross-Exceptions to the Decision, to which this Answering Brief responds.

STATEMENT OF RELEVANT FACTS [3]

5.) The MHT Market Adjustment Proposal

The Hospital and the Union began negotiations for a successor CBA in October 2016. (Tr. 31, 253) From virtually the outset of the parties' negotiations, the Union regularly requested that the Hospital perform a market adjustment, specifically for MHTs. (Tr. 39-40, 156, 159, 188-89, 415); R. Exs. 19, 22, 25, 28, 31, 33, 35, 40, 44; G.C. Ex. 5. As a separate matter, the Union's bargaining

[2] At the outset of the hearing on August 5, 2019, Consolidated Complaint paragraphs 1(a), 5(c), 5(d), and the reference in Consolidated Complaint paragraph 5(e) to Registered Nurses were all struck from Consolidated Complaint. (Tr. 16-18)

[3] Given the voluminous and highly detailed nature of the factual record, the Hospital sets forth herein only those facts relevant to the discussion of the issues raised by the General Counsel's Cross-Exceptions. For a full accounting of the facts adduced in the record, the Hospital respectfully refers the Board to the Brief in Support of its Exceptions, which was filed by the Hospital on December 10, 2019.

proposals also included a proposal for across-the-board wage increases for all bargaining unit employees. [4] R. Exs. 14, 17, 22, 25, 33, 35; G.C. Ex. 5, 10. In response to the Union's requests for a market adjustment for MHTs, on June 14, 2017, the Hospital proposed for the first time, in a Memorandum of Agreement, that it would perform a market survey / wage review for MHTs within 90 days, and could utilize the market survey to implement wage increases at its discretion. (Tr. 316-317); R. Ex. 39. This proposal was, once again, separate and apart from the parties' proposals for across-the-board wage increases that would apply to all bargaining unit members. R. Ex. 39. The Hospital's Chief Negotiator, Robert Sincich, testified that market adjustment language had existed in the parties' 2014-2016 CBA, which read, in relevant part, "The Hospital has the right to evaluate each job classification for purposes of determining the need for market pay adjustments and will, *at management's discretion,* raise the compensation level as determined necessary for those job classifications". G.C. Ex. 2, Art. 11, Sec. 5 (emphasis added). The Hospital's proposed Memorandum of Agreement was repeated in the Hospital's July 25, 2017 proposal, as well as the Hospital's August 25, 2018 Final Offer. G.C. Exs. 3, 4, 6.

[4] Contrary to the General Counsel's assertion, the Union did not request that all job classifications have their wages compared to the market. AB 5, 6. Rather, the Union claimed that all classifications required a wage increase, which – as explained throughout this Brief – is a separate form of compensation from a market adjustment.

Despite the Union's Chief Negotiator, Kevin Hefty, testifying to the contrary, the record does not suggest that the Union ever objected to the Hospital's retention of discretion as to whether or not to implement wage increases for MHTs on the basis of the market survey it conducted. In fact, Sincich testified that the Union had *never* made this objection during negotiations. (Tr. 249) Similarly, neither Hefty nor Sincich's notes ever reflect an objection by the Union that was premised on the Hospital's retention of discretion to implement increases. See R. Exs. 37, 40, 43, 45, 46, 50; G.C. Exs. 5, 7, 10, 17, 20. The Union never made a counterproposal to the Hospital's proposal, in which the Union proposed a right to bargain over the results of the market survey conducted by the Hospital, nor is there any evidence that the Union filed a ULP Charge, alleging that the Hospital's proposal was unlawful, or constituted bad faith bargaining. (Tr. 158, 349, 415)

After declaring impasse on October 6, 2017, the Hospital began implementing its Final Offer, including the Memorandum of Agreement concerning a market survey for MHTs. (Tr. 343). On December 1, 20187, the Hospital advised the Union that the Hospital had completed a review of the wages of MHTs, consistent with the terms of the Hospital's Final Offer, and was going to provide increases to MHTs as a result of that review, effective December 10, 2017. (Tr. 68-69); G.C. Ex. 13. The Union responded, contesting that the parties were at impasse, but accepting the

results of the market survey and the resulting increases. (Tr. 75-76, 360-61); G.C. Ex. 16.

6.) The Union's Requests for Information and Subsequent Proposals

The Union did not file a request for information concerning the MHT wage increases resulting from the market survey until December 1, 2017, after it learned that the Memorandum of Agreement had been implemented. (Tr. 349); G.C. Ex. 14. Specifically, on December 1, 2017, the Union requested the names of the MHTs who were receiving increases as a result of the wage survey, the amount of the wage increases, and "documents and analysis [...] used to determine the new adjusted rates". G.C. Ex. 14. On December 7, 2017, the Hospital responded to the Union's request, and provided the list of MHTs receiving increases, as well as the amount of the increases. G.C. Ex. 14. On December 7, 2017, Hefty followed up, asking how the new rates were calculated and whether there was a new pay scale. G.C. Ex. 14. On December 8, 2017, the Hospital again responded to the Union's request, and provided Hefty with the new pay scale for MHTs that had resulted from the Hospital's wage survey. G.C. Ex. 14.

The parties additionally discussed the Union's questions about the wage increases for MHTs that had resulted from the Hospital's wage review at bargaining on December 20, 2017 and January 17, 2018. (Tr. 76-77, 348); R. Ex. 46, 50; G.C. Ex. 17, 20. Apparently unsatisfied with the information it had received, months

later, on April 4, 2018, the Union filed a ULP Charge against the Hospital, claiming that the Hospital refused to provide requested information. R. Ex. 9. On May 25, 2018, with the Union having received no additional information from the Hospital, the Union withdrew its Charge. R. Ex. 10.

After the Memorandum of Agreement was implemented by the Hospital as part of its implementation of its Final Offer, but before receiving much of the information responsive to its requests concerning the wage increases that had resulted from the MHT survey, on December 20, 2017 the Union proposed *identical* market surveys and wage increases be implemented for three additional job classifications within the bargaining unit. (Tr. 82-83, 159-60, 356-57); R. Ex. 46; G.C. Ex. 19. The Union's proposals did not distinguish its proposals from the prior market adjustment language implemented by the Hospital in any way, and instead simply stated that the Union "proposes a wage review for" the three additional classifications. G.C. Ex. 18. Finally, Hefty testified that the Union eventually reached a tentative agreement with the Hospital that included Memoranda of Agreement addressing market adjustments for the additional job classifications that were identical to the Memorandum of Agreement proposed by the Hospital for MHTs. (Tr. 182)

SUMMARY OF ARGUMENT

The General Counsel's Cross-Exceptions are without merit. They raise nothing more than retrospective red herrings - the product of the General Counsel's attempts at creativity, rather than actual issues in dispute between parties during the course of their negotiations. In order to support these *post hoc* arguments raised in hindsight and outside the context of the parties' relationship, the General Counsel repeatedly misconstrues the record and mischaracterizing record evidence. Once these mischaracterizations of the record are corrected, both of the General Counsel's "alternative theories" must fail.

First, the General Counsel's claim that the Hospital was obligated to share additional information concerning the market survey it would eventually conduct for MHTs, before it had conducted such a survey, and in the absence of any request by the Union for any such information is unsupported by any precedent, as is the General Counsel's related conclusion that the Hospital's failure to provide such information prevented the Hospital from declaring impasse. Equally unsupported by law and fact is the General Counsel's second theory – namely, that the Hospital was precluded from declaring impasse by the fact that the exact amounts of the wage increases that resulted from the Hospital's market survey were not "included" in the Hospital's Final Offer, and / or were "higher" than the across-the-board wage increases contained in the Final Offer. Thus, for all these reasons, the Hospital

respectfully requests that the Board reject the Cross-Exceptions filed by the General Counsel in their entirety.

ARGUMENT

1.) The Unsupported Mischaracterizations of the Record

The General Counsel's Brief in Support of Cross-Exceptions regularly misconstrues the evidence presented by both parties to fit the General Counsel's alternative theories on impasse. First, the General Counsel attempts to marshal evidence in support of the claim that the Union had challenged the Hospital's proposed "sole" or "unfettered" discretion over wage increases resulting from a MHT market survey. BSE 4, 6, 14. However, while it is true that Hefty testified to such a concern, his testimony is entirely unsupported by the remainder of the evidentiary record. Sincich testified that the Union had never voiced such an objection during bargaining over the Memorandum of Agreement, and none of the copious bargaining notes taken by either party so much as reference that concern being raised by the Union.

Even more telling is the fact that Hefty's summary of the Hospital's Final Offer, which he created for the Union's members, in order to educate them on the Final Offer before their ratification vote, does not so much as mention the Union's alleged objection to or concern about the Hospital's unilateral right to implement increases – rather, with regard to the Hospital's proposed market adjustment for

MHTs, the summary simply states, "Employer commits to review wage rates of Mental Health Techs within 90 days of ratification". G.C. Ex. 22. Equally telling is the fact that the Union proposed, and later agreed to, *identical* market survey and wage adjustment language for additional job classifications within the bargaining unit – if the Union objected so strenuously to the unilateral nature of any increases resulting from the MHT market survey, it stands to reason they would not have proposed identical terms for these additional classifications, and later reached a Tentative Agreement that contained those identical terms for those additional classifications.

Next, the General Counsel goes to great lengths to distinguish the market adjustment language that appears in the parties' 2014-2016 CBA from the market adjustment language that appeared in the Final Offer. BSE 8. These efforts, however, are unconvincing. In point of fact, the difference relied upon by the General Counsel was that the language of the 2014-2016 CBA required the Hospital to give notice to the Union of any wage increases it was going to implement as a result of a market survey. BSE 8, FN 2. This right to notification in no way modified the unilateral nature of the Hospital's discretion to implement wage increases as a result of a market survey under the language of the 2014-2016 CBA. "Notice" pursuant to the 2014-2016 CBA did not entitle the Union to bargain over the increases, object to the increases, stop the increases from happening, or change

the amount of the increases, and thus, the nature of the Hospital's right to implement increases under the 2014-2016 CBA was every bit as unilateral and discretionary as the Hospital's right to implement increases pursuant to the Memorandum of Agreement. [5]

Internally inconsistent, but equally unsupported by the record, is the General Counsel's claim that the wage increases for MHTs that had resulted from the Hospital's market survey "caught the Union off-guard" (BSE 7) and "surprised" (BSE 10) the Union, who the General Counsel alleges believed that any wage increases would be bargained before implementation (BSE 8). First, the General Counsel's contentions in this regard make no logical sense, in light of the Cross-Exceptions' adamant claims that the Union repeatedly objected to the unilateral nature of any wage increases resulting from the market survey pursuant to the Memorandum of Agreement. If the Union was aware of, and actively objecting to, the "risk" of unilateral wage increases, how could the Union be surprised when those unilateral wage increases were implemented unilaterally? Similarly, the assertion that the Union was surprised that the Hospital ultimately granted wage increases after conducting a market survey is contradicted by the fact that the Union repeatedly

[5] The General Counsel's contention that Sincich "acknowledged that the language [of the 2014-2016 CBA] was materially different" (BSE 8) is not supported by Sincich's testimony, wherein he maintains his position that the two provisions are similar. See (Tr. 380-381).

stated during bargaining that a market survey would illustrate that MHTs were being paid below the market – thus, that the Hospital's wage survey uncovered the same fact would hardly come as surprise to the Union. Second, the General Counsel's assertions of surprise are simply unsupported by the record. The Hospital first proposed the Memorandum of Agreement on June 14, 2017. It proposed the same Memorandum of Agreement again on July 10, 2017, and yet again in its August 25, 2017 Final Offer. None of the details of the Memorandum of Agreement were a surprise, or a change from the Hospital's prior proposals.

Finally, the General Counsel's claim that the Union "demanded to bargain" over the results of a wage survey (BSE 7) at any point in time after the Hospital began proposing a market adjustment for MHTs are entirely unsupported by the evidentiary record, which contains no evidence of even a counterproposal by the Union, much less any such "demand to bargain" by the Union. In this vein, the General Counsel's claim that the Union's December 20, 2017 proposal for a one-year CBA, as opposed to a three-year CBA as had been proposed by both parties until that point in time, was made in order to bargain over the results of a market survey (BSE 14), is unsupported by the record. This assertion by Hefty was, in fact, specifically and rightfully rejected by ALJ Carter in his Decision. See Decision 15, FN 7.

2.) The Hospital Had No Obligation to Share Information Before Impasse and Implementation

The General Counsel's mischaracterization of the evidentiary record is designed to further support two untenable theories, pursuant to which the General Counsel contends the Hospital was precluded from declaring that an impasse had been reached in the parties' negotiations. First, the General Counsel contends that the Hospital unlawfully declared impasse and implemented the MHT market adjustment and wage increases because it did not share market study information that it allegedly possessed with the Union. BSE 12-15. This theory, with all due respect to the General Counsel, is wholly unsupported by the record. The General Counsel alleges that the Hospital did not undertake a market survey for MHTs until October 23, 2017 – well after the Hospital had declared impasse on October 6, 2017. BSE 7, FN 6. Thus, before the Hospital declared impasse and implemented its Final Offer, the General Counsel cannot, by its own timeline, allege that the Hospital was "sitting on" a MHT market survey that it refused to share with the Union.

Furthermore, even if the Hospital *had* conducted a market survey before October 6, 2017, it was under no obligation to share the results of that survey with the Union, where the Union *never requested such information*. [6] The Hospital made

[6] The Union's request for information, dated September 21, 2016, and made before the parties even began bargaining a successor agreement, is a paper tiger. The Union and the General Counsel now appear to claim that the request remained outstanding over the course of the over a year of negotiations, but there is no evidence to support

the same proposal regarding a wage survey and potential wage increase for MHTs on three occasions. The Union never asked the Hospital for *any* information about the Hospital's proposed Memorandum of Agreement, in writing or at bargaining: the Union did not ask what data the Hospital would use to conduct a market survey; the Union did not ask what types of positions the Hospital would compare to the Hospital's MHTs; the Union did not ask what facilities or geographical regions the Hospital intended to draw the data for the market survey from; the Union did not ask the Hospital if it was setting any parameters, or creating a formula for, any unilaterally-granted increases to MHTs; the Union did not ask the Hospital whether certain results in the market survey would trigger increases, or alternatively, cause the Hospital *not* to grant increases. All of these questions would have permitted the Union to analyze the Hospital's proposal in greater detail, but it did not avail itself of the opportunity to request any such data. The Hospital cannot be faulted for the Union's failure in this regard.

This is the key fact that distinguishes the case at bar from the cases cited by the General Counsel's Cross-Exceptions. In all of cases cited by the General

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this contention, particularly the request speaks in terms of any market analysis that the Employer "had done" as of September 2016. C.P. Ex. 2. Furthermore, if the Union or Region Four of the Board truly believed that the Hospital owed the Union information pursuant to the September 2016 request, it stands to reason that the Union would not have withdrawn its ULP Charge, and the Region would have found merit to its claim, that information requested from the Hospital by the Union remained outstanding.

Counsel - Alachua Nursing Center, 318 NLRB 1020 (1995), Wayron, LLC, 364 NLRB No. 60 (2016), Colorado Symphony Assoc., 366 NLRB No. 122 (2018), and Decker Coal Co., 301 NLRB 729 (1991) - the unions had ***affirmatively requested*** financial information from the employers before the employers declared impasse in various types of negotiations, which thus prevented implementation of the Employer's final offers. Thus, it is clear that these factually distinct cases do not stand for the proposition that, under the circumstances of the instant case, the Hospital had an affirmative obligation to provide any additional information to the Union, or that its failure to do so, particularly in the absence of any request by the Union before impasse, precluded the Hospital from declaring impasse or implementing the terms of its Final Offer.

Finally, the General Counsel makes much of the fact that, once the Union finally did request information about the market adjustment performed by the Hospital consistent with its Final Offer, the Hospital provided that information to the Union over a period of time. First, to the extent the General Counsel attempts to allege that the Hospital withheld information, or even delayed in providing information, in violation of the Act, such claims are undercut by the fact that the Union withdrew its ULP Charge raising the same allegations. Additionally, the General Counsel's claim that the Union required the requested information in order to evaluate and formulate bargaining proposals (BSE 14) is not supported by the

record, which illustrates that the Union not only advanced wage proposals without having received all of the information about the MHT market adjustment that it had requested from the Union, but in fact proposed ***an identical market survey and adjustment*** for other job classifications in the bargaining unit without additional information. Thus, the record clearly establishes that the Union was comfortable making wage proposals without the information it had requested – so comfortable, in fact, that it proposed more market surveys be conducted, and more wage increases granted, pursuant to identical terms as were employed to conduct MHT market survey.

3.) MHT Market Adjustments Were Included in the Hospital's Proposals

The General Counsel next claims that the parties could not have reached an impasse in bargaining because the "wage increases" granted by the Hospital to MHTs were not proposed at the bargaining table. BSE 15. Here too, the General Counsel is wrong on the facts, and wrong on the law. Factually, the General Counsel's claim that the market adjustments that were granted by the Hospital to MHTs were not proposed at the bargaining table is disproven by the record, which illustrates that the Hospital proposed, on three separate occasions, that it would conduct a market review for MHTs, and on the basis thereof, would have the discretion to grant wage increases to the MHTs. Thus, the Hospital's discretion as

to whether to award increases, and to determine the amount of the increases, were also both proposed at the bargaining table, as well.

The General Counsel's related claim that the parties could not be at impasse because the wage increases awarded to the MHTs pursuant to the Memorandum of Agreement contained in the Final Offer were higher than the across-the-board wage increases proposed by the Final Offer (BSE 15) is equally without merit. Once again, the General Counsel has conflated the across-the-board wage increases proposed by the Hospital with the market adjustments proposed by the Hospital. The two types of increases are entirely separate methods of increasing compensation, which follow different rationales and support separate objectives – the Hospital's proposal regarding one is not the same as the Hospital's proposal regarding the other. In point of fact, all employees received the across-the-board increase proposed in the Final Offer, and a number of MHTs additionally received a market adjustment as proposed in the Final Offer. Thus, it cannot be said that the market adjustments "functioned" as across-the-board increases that were higher than those proposed in the Final Offer.

Finally, the case law relied upon by the General Counsel in support of its contentions is thus readily distinguishable. For the reasons explained above, the factual circumstances presented to the Supreme Court in NLRB v. Crompton-Highland Mills, 337 U.S. 217 (1949) are not presented in this case, as the market

adjustments were not higher than any market adjustments proposed at the bargaining table. Similarly, the fact patterns presented by Alachua and Wayron, *supra*, are also entirely distinct. Furthermore, there simply is no precedent offered by the General Counsel that supports its claim that, because the exact amount of the increases that could be granted pursuant to the Memorandum of Agreement were unspecified, the Hospital was precluded from declaring impasse and implementing its Final Offer. Therefore, the precedent relied upon by the General Counsel fails to make a compelling case upon further scrutiny.

4.) The General Counsel's Attempts to "Sit in Judgment" of the Hospital's Bargaining

Finally, the General Counsel's Cross-Exceptions are rife with examples of the General Counsel's improper desire to substitute his own judgments for those of the Hospital. In bargaining, the Act does not compel either party to agree to any specific proposal, or yield or compromise on its positions. NLRB v. American Ntl. Ins. Co., 343 U.S. 395 (1952); NLRB v. Ins. Agents Intl. Union, 361 U.S. 477 (1960). In keeping with this principle, the Supreme Court has advised that the "[T]he Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining." NLRB v. American Ntl. Ins. Co., 343 U.S. 395 (1952). Similarly, in H.K. Porter Co. v. NLRB, the Supreme Court instructed the Board to "oversee and referee the process" of negotiations, but cautioned that the Board must "[leave] the results of the contest to

the bargaining strengths of the parties". 397 U.S. 99, 107-108 (1970). For the Board to go further in compelling certain bargaining outcomes, the Supreme Court held, "would violate the fundamental premise on which the Act is based – private bargaining under governmental supervision of the procedure *alone*, without any official compulsion over the actual terms of the contract." Id.; See Also, NLRB v. Reed & Prince Mfg. Co., 205 F.3d 131, 134 (1st Cir. 1953) (The Board cannot force an employer to adopt "any particular position".)

That the General Counsel improperly strives to achieve precisely this result is laid bare by the General Counsel's Cross-Exceptions. The General Counsel first takes issue with what he sees as the disparity between the Hospital's proposals on across-the-board wage increases and the market adjustments for MHTs that were implemented. See BSE 3, FN 9; BSE 11; BSE 13 (claiming the Hospital "changed its position radically"); BSE 15 (suggesting that, since the Hospital had additional money for market adjustments, it could have conceded to richer across-the-board wage increases or health insurance proposals). As stated previously, the General Counsel repeatedly fails to grasp that across-the-board wage increases and market adjustments are proverbial apples and oranges – an employer may see the need for a market adjustment, but not the need for greater across-the-board wage increases. Furthermore, the Hospital's willingness to allocate money to a market adjustment is not synonymous with being willing – or more importantly, legally required - to

allocate more money for across-the-board wage increases or health insurance, and agreeing to allocate more money to one issue or proposal is not the same or synonymous with agreeing to do the same for the another. The fact that the General Counsel apparently thinks the Hospital should have or could have done so, or "more wisely" allocated the money used for the MHT market adjustment is legally irrelevant, and the General Counsel's insistence that any other course of bargaining would be unlawful must therefore be rejected.

Similarly, the General Counsel's speculation about how Hospital could have "more productively" negotiated a deal is equally improper. The General Counsel claims that the Hospital should have been obligated to share the results of the market survey before declaring impasse or implementing its Final Offer, because, in the General Counsel's opinion, sharing the results of market survey would have produced a deal between the parties. BSE 13. Aside from being wildly speculative, the General Counsel's assertions that the Hospital had to compromise its position on market adjustments for MHTs "for the good of the deal" is not permitted by the extant Supreme Court precedent cited above.

Finally, the General Counsel's apparent frustration with the market adjustments awarded by the Hospital – which the General Counsel claims were based on "no readily apparent rationale" (BSE 7) is similarly not a procedural issue to be refereed by the Board. The question of the rationale behind the Hospital's

proposals or the Hospital's dedication to them – provided there is not an allegation that the Hospital acted in bad faith – is not relevant to whether the Hospital is entitled to maintain its position or not. In all of these regards, it is clear that the General Counsel has misunderstood the role of the Board. The Board cannot stand in judgment of the parties' proposals, basing its determinations off of whether it thinks that the parties made the "best", "smartest", "most reasonable", "most affordable", or "most cooperative" proposals. Instead, it is the Board's job to determine, whatever the parties' proposals and fixed bottom lines, whether the parties had reached the end of their bargaining ropes. Neither the General Counsel nor the Board should be permitted to substitute its opinion for that of the Hospital with regard to what the Hospital's bottom line was, or should have been, and the General Counsel's analysis should have been singularly focused on the question of impasse.

CONCLUSION

For all the reasons set forth above, the Hospital respectfully requests that the Board reject the arguments set forth by the General Counsel's Cross-Exceptions and Brief in Support of Cross-Exceptions, and reject the General Counsel's Cross-Exceptions.

Dated: April 2, 2020
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Respectfully submitted,

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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

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and	:	
SERVICE EMPLOYEES INTERNATIONAL UNION HEALTHCARE PENNSYLVANIA	:	

CERTIFICATE OF SERVICE

As an attorney duly admitted to the practice of law, I do hereby certify that, on April 2, 2020, I served a copy of the document above on the following *via* e-mail:

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Dated: April 2, 2020
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